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No. 537

In the Supreme Court of the United States

OCTOBER TERM, 1940

FASHION ORIGINATOR'S GUILD OF AMERICA, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 4671) is reported in 114 F. (2d) 80.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on August 24, 1940 (R. 4694). Petition for certiorari was filed on October 31, 1940, and was granted November 25, 1940. The jurisdiction of this Court rests upon Section 5 of the Federal Trade Commission Act (15 U. S. C., sec. 45) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

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QUESTION PRESENTED

Whether petitioners' combination to restrain interstate commerce by boycotting retailers marketing unauthorized copies of petitioners' dress designs and by inducing and coercing retailers to boycott manufacturers selling unauthorized copies, may be justified by evidence as to the economic necessity and the beneficial consequences of the program.

STATUTE INVOLVED

The statute involved is the Act of September 26, 1914, c. 311, 38 Stat. 717 (15 U. S. C., secs. 41 *et seq.*), as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111 (15 U. S. C., Supp. V. secs. 44, 45), known as the Federal Trade Commission Act. The pertinent provisions of this Act are as follows:

> SEC. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:
>
> "Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.
>
> * * * * *
>
> SEC. 5. Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair

methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * * * *

Section 5 further authorizes any party against whom the Commission has entered a cease and desist order to obtain a review on the law in an appropriate circuit court of appeals; gives such court jurisdiction to affirm, set aside or modify the order; and provides that the Commission's findings as to the facts, if supported by evidence, shall be "conclusive."

STATEMENT

This case involves the validity of an order of the Federal Trade Commission, issued under Section 5 of the Federal Trade Commission Act, directing the Fashion Orginators' Guild of America, Inc., the officers, members and affiliates of Fashion Originators' Guild of America, Inc., certain retail guilds, and various retailers of women's garments, to cease and desist carrying out a plan to prevent so-called "style piracy" or copying of designs for women's garments. The petitioners include the Fashion Originators' Guild of America, Inc., which will be referred to herein as FOGA, and the manufacturers named as respondents in the Commission's complaint, who will be referred to as members.[1]

[1] All of the various persons and guilds against whom the Commission issued its order (R. 135) are seeking a reversal of that order with the exception of Austin M. DeLisser, E. W. Freudenberg, Samuel Levine, E. E. Meyer, National Federation of Textiles, Inc., Peter Van Horn, and Irene L. Blunt.

The original complaint was issued by the Federal Trade Commission on April 16, 1936, charging that the petitioners had been guilty of unfair methods of competition under Section 5 of the Federal Trade Commission Act (R. 3–25). Answers were filed (R. 26–83) and hearings were held before trial examiners at various times and places commencing July 15, 1936, and closing March 16, 1938 (R. 151, 4451). On February 8, 1939, the Commission issued its findings of fact, conclusions of law and order (R. 107–148).[2] The court below, in affirming the order, held that "The findings are supported by an abundance of evidence and are indisputable * * *" (R. 4672). The petitioners have not assigned error to the court's ruling and raise no issue as to the sufficiency of the evidence to support the findings.[3] Those findings may be summarized as follows:

FOGA is a membership corporation organized in 1932 under the laws of New York by approximately 15 manufacturers of women's garments selling at wholesale for from $29.50 up (R. 108, 122). Manufacturers of lower priced women's garments were later included so that by 1935 the price range ran

[2] On March 29, 1939, the Commission, on its own motion, deleted a portion of the order which is immaterial to the present proceeding (R. 149–150).

[3] Petitioners rely primarily on the refusal of the trial examiners and the Commission to receive certain evidence proffered to prove the economic necessity and beneficial consequences of petitioners' activities. The offer of proof is described, *infra* pp. 12–13.

from $6.75 up per garment (R. 122). Also, manufacturers of textiles used in the women's garment manufacturing industry were admitted to membership (R. 122). By April 1936 the membership of the Guild consisted of 176 manufacturers of women's garments and 49 manufacturers, converters, dyers, and printers of textiles (R. 110–117; 122).

The garment manufacturing members of FOGA are a dominant factor in the women's garment industry. Their products are in such demand by the purchasing public that all retail dealers find it necessary to handle some of the lines manufactured by FOGA members in order to meet competition and public demand. In 1936 FOGA members sold 38.8 percent of all women's garments in the United States in the wholesale range of $6.75 and up and 63.99 percent in a wholesale price range of $10.75 and up (R. 121–122).[4]

FOGA was organized primarily for the purpose of preventing the copying for sale in commerce of alleged original creations of fashions and styles of women's garments (R. 122). This program was later expanded to afford protection to designs of textiles used in the manufacture of women's garments by an arrangement with the National Federation of Textiles, Inc., having a membership of approximately 100 manufacturers, converters, dyers, and printers of silk and rayon fabrics. (R. 119, 122, 128.)

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[4] As pointed out by petitioners in their brief (p. 11, n. 12), the figure 83.99 contained in the Commission's findings (R. 122) is a misprint. The correct figure is 63.99.

In furtherance of its purpose, FOGA secured at the outset the cooperation of local retail guilds located in Chicago, Minneapolis, and Baltimore (R. 117–119, 122). FOGA agreed to deal only with members in good standing in the local guilds. In return the local guilds agreed that their members (1) would not purchase from manufacturers not conforming to the ethics and the regulations of FOGA; (2) would not knowingly buy or sell copies of styles legitimately registered with the Guild; (3) would accept the decision of the "style piracy" division of FOGA on all questions of alleged design piracy; and (4) would stamp all orders for women's merchandise with the following warranty clause:

> This order is placed upon the seller's warranty that the above garments are not copies of styles originated by members of the Fashion Originators Guild of America, Inc. The purchaser reserves the right to return any merchandise which is not as warranted.

The agreement further provided that the local guilds would suspend from membership any member who violated any of the provisions of the agreement and that none of their members would purchase from any member of FOGA who violated any of the above conditions until that member had been restored to good standing. (R. 123–124.) The above agreements were fulfilled by FOGA and its members and by the various local guilds and their members (R. 124).

In 1933 FOGA expanded its program and distributed to individual retail dealers in women's garments in territories which had no local guild a so-called "Declaration of Cooperation" to be signed by the individual retailer. The "Declaration of Cooperation" imposed upon the individual retailer substantially the same obligations as were imposed upon the members of the local retail guilds by the agreement described above. At first FOGA sought voluntary cooperation but after a number of signatures had been secured it coerced and compelled retailers to sign the declaration by threatening to refuse and refusing to permit members of FOGA to sell or to show merchandise to retailers who had not signed (R. 124).

As a result of the coercive activities by FOGA, approximately 12,000 retail dealers had signed the "Declarations of Cooperation" by the end of 1935. The majority of the 12,000 retail dealers who signed the "Declarations of Cooperation" did so because of threats that FOGA members would not exhibit or sell merchandise to them. Some retailers refused to sign and as a result the members of FOGA refused to sell or exhibit their merchandise to these noncomplying retailers. (R. 125.)

In furtherance of its program FOGA maintains a Design Registration Bureau with which members may register the design and style of each woman's garment claimed to be an original creation (R. 125–126). A "piracy committee" is established

which determines whether the garments alleged to be copies of original styles and designs created by FOGA members are such in fact, and review of the committee's decision may be had before other committees (R. 126). FOGA employs "shoppers" in principal cities to examine the stocks of women's apparel in the various retail stores to determine whether or not they are selling copies of registered designs (R. 126–127).[5]

FOGA maintains an elaborate white and red card index of retailers which, in effect, constitutes an approved list (white card) and a black list (red card) of retail stores, and all FOGA members refuse to sell to black-listed retail dealers. On March 20, 1936, more than 400 retail dealers located in various places in the United States were on the black list (R. 127).

A similar restrictive plan for protecting textile designs has been established by FOGA in conjunction with the National Federation of Textiles, Inc., which maintains a bureau known as the Industrial Design Registration Bureau. By agreement, the garment manufacturing members of FOGA refuse to buy textiles which are not registered in the Bureau and textile members of FOGA sell only to garment manufacturers who become parties to the agreement (R. 128).

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[5] The examination is made openly in the case of cooperating retailers but the "shoppers" do not disclose their identities to noncooperating retailers. Whenever copies of registered designs are discovered, a report is made to FOGA. (R. 126–127.)

FOGA, by resolutions and otherwise, has bound its members to observe various minor rules and regulations such as the prohibition of discounts in excess of a fixed maximum, the prohibition of retail selling or participation in retail advertising, and the prohibition of selling women's garments to persons conducting businesses in residential quarters (R. 129). Auditors are employed to audit the books of members to ascertain whether the members are selling to black-listed retailers or violating any of the other regulations (R. 130). Violations by members are punishable by fines ranging in one instance to $1,500 for a single violation, and FOGA announced that future violations would be punished by a fine of $5,000 (R. 130).

Retailers who have failed or refused to cooperate with FOGA have been occasioned loss of good will and great financial loss by the refusal of members to sell them merchandise (R. 130). Likewise, manufacturers who are not members of FOGA have been occasioned great financial loss due to retailers returning garments declared to be copies of designs registered with FOGA and also due to the activities of FOGA in inducing and compelling retailers to refrain from purchasing any merchandise from manufacturers declared to be confirmed copyists (R. 130–131).

As a result of the activities of FOGA and its members in sponsoring the foregoing program and in carrying out and enforcing the agreements made

pursuant thereto the following conditions and effects, among others, have been brought about (R. 131–132):

(1) Competitors of members of FOGA and the National Federation of Textiles, Inc., have been prevented from making sales of their products and shipments in interstate commerce with a resultant substantial lessening and suppression of competition in interstate commerce in the sale and shipment of women's garments and textiles.

(2) Retail dealers in women's garments have been prevented from buying their requirements from manufacturers boycotted by FOGA with the result that interstate commerce in the purchase and sale of women's garments has been substantially lessened and suppressed.

(3) FOGA and the National Federation of Textiles, Inc., have obtained and exercised control over the business practices of a majority of the manufacturers and distributors of women's garments and textiles and have the power to exclude from the industry those manufacturers and distributors who do not conform to their rules and regulations and thus they tend to create in themselves a monopoly of the industry.

(4) FOGA has coerced and compelled retail dealers to sign the Declaration of Cooperation submitted by the Guild.

(5) FOGA has caused retail dealers in women's garments who have not signed the Declaration of

Cooperation, or who having signed have violated it, to suffer great financial loss.[6]

From these findings of fact the Commission concluded that petitioner's activities constituted unfair

[6] In addition, the Commission found that FOGA and its members had been responsible for bringing about the following conditions which are important to show the extent of their activities (R. 131–132):

(1) FOGA fixes the amount of discounts to be given by its garment manufacturing members to retail dealers.

(2) Garment manufacturing members refuse to sell merchandise at retail or to persons conducting business in residential quarters.

(3) FOGA prohibits its garment manufacturing members from participating in retail fashion shows.

(4) FOGA prohibits its garment manufacturing members from subsidizing retail advertising.

(5) FOGA exacts fines from its garment manufacturing members for violation of its program.

(6) Garment manufacturing members refuse to buy from or sell to textile manufacturers who sell to noncooperating retailers.

(7) Textile members refuse to sell their products to noncooperating manufacturers.

(8) Garment manufacturing members refuse to purchase textiles from manufacturers who do not register their designs with the Industrial Design Registration Bureau.

(9) Textile members refuse to sell to manufacturers who will not purchase exclusively from textile manufacturers registering their designs with the Industrial Design Registration Bureau.

(10) Garment manufacturing members refuse to sell to retail dealers in Chicago, Minneapolis, and Baltimore who are not members in good standing of the respective local guild in those cities, and members of the local guilds confine their purchases of women's garments to members of FOGA (R. 131–133).

methods of competition in commerce, and tended to create a monopoly within the intent and meaning of the Act (R. 134). Thereupon the Commission issued its order directing petitioners to cease and desist their unlawful acts (R. 135–150).

A petition to review and set aside the Commission's order was duly filed in the Court of Appeals for the Second Circuit (R. 1a–32a). In a unanimous opinion filed July 22, 1940, the court held that petitioners were engaged in an unlawful boycott, that their activities tended to create a monopoly, that the exclusion from the market of any who supply it is unlawful *per se*, and that, therefore, the Commission properly refused to hear evidence in excuse of the practices and ordered petitioners to cease and desist the practices (R. 4671–4679).[7]

Petitioners do not challenge the Commission's findings but rely upon the refusal of the trial examiner and the Commission to receive certain evidence on the ground that the practices of FOGA could not be justified by evidence of what the necessity of the action may have been (R. 4307–4309). The evidence was offered to establish the reasonableness of the restraint of trade here involved. According to the offers of proof, this evidence would show

[7] At the conclusion of its opinion the court stated that the Commission's order "will not be understood to apply to cases in which a retailer knowingly buys dresses, access to the design of which has been procured (1) by fraud, bribery or any other crime, (2), through some breach of contract, or (3) before the design has by 'publication' come into the public demesne" (R. 4679).

(R. 4309-4327): That manufacturers in the women's garment industry are divided into two classes, (1) those who adapt the styles of the leading fashion centers of the world into original designs for dresses, and (2) the copying manufacturers who systematically pirate the designs of originators and sell them more cheaply. Without such copying original designs would have value for about three months after an initial sale. Copyist manufacturers wait until the originators develop designs and then by whatever means necessary they meticulously copy such original designs and sell such copies cheaply, thus obtaining the benefit of the originator's investment and ability without cost to themselves. Such style piracy has caused detrimental effects to the women's garment business through loss to the original manufacturer of designs and through the creation of sweat shops. Customers who think they have bought exclusive dress designs find the market flooded with copies. These conditions and others detailed in the offers of evidence, according to petitioners' contention, would show slow disintegration of the women's garment industry if it had not been for the Guild and its program.

ARGUMENT

All of the issues raised by this case are involved in *Millinery Creator's Guild, Inc., et al.* v. *Federal Trade Commission*, No. 251, now before this Court. The arguments advanced in the Government's brief in No. 251 at pages 12 to 34 are equally applicable to the instant case. Consequently, those arguments

will not be repeated but are adopted as our affirmative argument on the issues here presented and this brief will be confined to commenting on certain inferences and arguments contained in the brief for petitioners.

Petitioners insist that this case is distinguished from the *Millinery Creator's Guild* case by the fact that in the latter the Commission made an affirmative finding that the combination had the capacity and effect of maintaining prices, whereas no such finding was made in this case. We do not concede that the differences in the Commission's findings afford a valid basis for distinguishing the cases. But, in any event, the legal significance to be attached to the findings on price maintenance has been considered separately in our brief in No. 251 and is not sought to be applied to this case. The only other basis for distinguishing the two cases is that in the *Millinery Creator's Guild* case the parties were afforded full opportunity to present evidence as to the reasonableness of the restraints which they imposed; in the instant case, on the contrary, the Commission refused to hear evidence offered to prove the economic necessity and beneficial consequences of petitioners' program. Although we submit that the evidence was not admissible in either case, we concede that if the evidence offered in this case was relevant and material to the issues before the Commission, it was error to exclude that evidence.

I

THE COMBINATION CANNOT BE JUSTIFIED ON THE GROUND THAT COPYING DESIGNS CREATED BY A COMPETITOR IS UNFAIR COMPETITION

Petitioners insist that the boycott here involved was directed against "unfair competition" and therefore was not illegal. They cite *International News Service* v. *Associated Press*, 248 U. S. 215, as direct authority for their position. The answer to this contention is contained in our principal brief at pages 24 to 34.

II

THERE IS NO MERIT IN PETITIONERS' ARGUMENT THAT THE RESTRAINT HERE INVOLVED IS NOT ILLEGAL PER SE BECAUSE IT DOES NOT REGULATE PRICE, PRODUCTION, OR QUALITY

In attempting to establish that the evidence excluded by the Commission was essential to the issue of whether or not the FOGA program violated the Sherman Act, petitioners argue that the question of reasonableness is open in all Sherman Act cases "where the restraint does not regulate prices, production or quality" (petitioners' brief, p. 45). Assuming *arguendo* that petitioners' statement of the law is correct, we submit that under their own test the restraint here involved must be held to be illegal *per se*.

1. The assertion that this case does not involve regulation of price is based on the failure of the Commission to make any finding similar to that

made in the *Millinery Creator's Guild* case, *supra*, that the scheme was designed to maintain prices, and on the statement of the court below that "The case at bar is not one of price fixing * * *" (R. 4677). However, it does not follow that the boycott instigated by petitioners had no regulatory effect on prices.

Petitioners claim that fundamentally the value of the commodity which they market is due to the fact that it represents the latest fashion; materials and workmanship are secondary considerations (petitioners' brief, p. 46). In other words the commodity which petitioners sell is "fashion." They argue that the copyist destroys the market for that commodity "by selling cheap replicas of the design" (petitioners' brief, p. 25). A striking example is contained in petitioners' offer of proof in which they state "it was no uncommon thing for a dress, originally produced fairly and honorably at, say, $79.50 retail, to be copied down by simulation to $16, thus completely destroying the worth, the investment of the creator of the original" (R. 4317). The only conclusion to be drawn from this example is that the purpose of the combination was to prevent the marketing of a product for $16 which was a "Chinese" copy [8] of a product which petitioners were selling for $79.50. The obvious desirability of accomplishing this objective from petitioners' standpoint is that the public will not pay $79.50 for the latest fashion if that commodity can be purchased for $16. The inevitable result of the boycott, if successful, would be to prolong

[8] Petitioners' brief, p. 18.

the period during which petitioners might demand $79.50 for a garment which in the eyes of the public differed in no way from another garment which in the absence of restraint would be offered at $16. In our view this amounts to putting a floor under prices by a method analogous to the removal of distress gasoline from the market which was condemned in *Socony-Vacuum Oil Co.* v. *United States*, 310 U. S. 150.

2. Petitioners' assertion that the boycott does not regulate production is equally fallacious. It is true that the boycott is not designed to limit the total number of garmets produced. However, the sole purpose of the boycott is to limit the number of manufacturers who may produce garments in accordance with certain designs.

The court below pointed out that the result of the boycott was to establish a monopoly of each original design in the hands of its creator (R. 4678).[9] Peti-

[9] It has been recognized that this factor has a direct bearing on the question of price effects. In Johnston & Fitch, *Design Piracy—The Problem and its Treatment under NRA Codes*, Trade Practice Studies Section, March 1936, it is stated (p. 199):

"* * * The consumer desiring a copy of a particular item receives the benefit of copyists' prices at the level which appeals to him. Without copying, the policies of the original manufacturer would govern the cost of a design to the consumer. Thus, instead of open price competition for the business which a particular design will command, there would be substituted competition between different designs in different qualities at whatever price level the manufacturer chose to impose. Price maintenance would be possible; monopoly prices would be possible insofar as the particular design received consumer preference over other articles of comparable quality and usefulness but different design."

tioners contend that the reason for limiting the number of manufacturers who may produce in accordance with a particular design is to prevent flooding the market with "cheap replicas" and thus destroying the "freshness of the design" (petitioners' brief, p. 25). It is implicit in this argument that rarity of reproduction enhances the value of a design but mass reproduction destroys that value.

Petitioners say that they seek to protect the value of their designs. It is not to be assumed that having secured a monopoly of their original designs petitioners engaged in immediate mass reproduction of those designs on the scale that those designs would have been reproduced if free copying had been permitted. That would have defeated the purpose which petitioners set out to achieve. Consequently, the production of garments of certain designs must have been restricted and limited by the boycott.

3. The premise underlying petitioners' proposition that no restraint of trade is illegal *per se* unless it regulates prices, production or quality, is that reasonableness will justify any restraint which does not affect the interests of the consuming public. Throughout their brief petitioners reiterate that the public is not harmed by the boycott, only "style pirates" and retailers who buy from them suffer. If, as we have urged above, prices and production are affected by the boycott there is a direct injury to the consuming public. Furthermore, if part of the consuming public has been deprived of desirable products by the boycott, the injury is equally as

great. We submit that that has been the effect of the boycott in this case.

As has been pointed out above, the commodity which petitioners market is "fashion." The numerous magazines devoted to women's styles and fashions and the extensive advertising to be found in every newspaper and magazine has created a demand by the buying public for garments of the latest design. Petitioners are a dominant factor in the manufacture of garments to meet this demand (R. 121). However, many if not all of the garments manufactured by petitioners are sold at prices beyond the means of a large portion of the buying public. If the demands of that part of the consuming public for the latest fashions which they see depicted in magazines and advertisements are to be met, it must be done by supplying equivalent garments at a lower price. That function is performed by the manufacturers whom petitioners condemn as "style pirates."

Petitioners argue that that portion of the consuming public to which they cater is benefited by the elimination of copying because it is enabled to purchase original designs with assurance that cheap copies are not being sold. We submit that the detriment of denying to a large portion of the public the opportunity of fulfilling desires which the customs of modern society have created cannot be counterbalanced by any such ostensible benefits to a select consumer group. Compare *Socony-Vacuum Oil Co.* v. *United States*, 310 U. S. 150, 220–222.

III

THE BOYCOTT INSTIGATED BY PETITIONERS HAS SUPPRESSED COMPETITION BY CLOSING TO COMPETITORS THE AVAILABLE MARKET OUTLETS

In an apparent effort to avoid the force of the Commission's unchallenged finding that "competition in interstate commerce in the purchase and sale of women's garments has been substantially lessened, hindered and suppressed" (R. 131), petitioners assert that the 12,000 retailers cooperating with FOGA represent only 19.8 percent of the available retail outlets (petitioners' brief, p. 10, n. 11). While this statement is literally true, it is misleading because petitioners have used the total number of Dry Goods, Department, Family Clothing, and Women's Ready to Wear stores in the United States as a basis for the computation. Obviously, thousands of the stores making up the total figures are located in rural communities or cater to a trade that has no interest in fashion. Petitioners and their competitors are engaged in marketing the latest fashions through outlets that cater to a trade which desires that type of merchandise. Petitioners have made no effort to determine the number of outlets which fall in that category. However, the Commission found that competitive conditions make it necessary for all retailers to handle some of the lines manufactured by

members of FOGA (R. 121–122).[10] Since members of FOGA refuse to sell to noncooperating retailers, it may be inferred that the 12,000 retailers represent substantially all available outlets for the class of merchandise here involved.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

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FEBRUARY 1941.

[10] Petitioners insist that the Commission's finding is absurd because all retailers do not buy garments priced as high as those made by petitioners (petitioners' brief, p. 11, n. 12). Literally read, the Commission's finding is not true, but taken in its context it is apparent that the Commission was referring to retailers who cater to the fashion trade.

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SUPREME COURT OF THE UNITED STATES.

No. 537.—October Term, 1940.

Fashion Originators' Guild of America, Inc., et al., *vs.* Federal Trade Commission.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 3, 1941.]

Mr. Justice Black delivered the opinion of the Court.

The Circuit Court of Appeals, with modifications not here challenged, affirmed a Federal Trade Commission decree ordering petitioners to cease and desist from certain practices found to have been done in combination and to constitute "unfair methods of competition" tending to monopoly.[1] Determination of the correctness of the decision below requires consideration of the Sherman, Clayton, and Federal Trade Commission Acts.[2]

Some of the members of the combination design, manufacture, sell and distribute women's garments—chiefly dresses. Others are manufacturers, converters or dyers of textiles from which these garments are made. Fashion Originators' Guild of America (FOGA), an organization controlled by these groups, is the instrument through which petitioners work to accomplish the purposes condemned by the Commission. The garment manufacturers claim to be creators of original and distinctive designs of fashionable clothes for women, and the textile manufacturers claim to be creators of similar original fabric designs. After these designs enter the channels of trade, other manufacturers systematically make and sell copies of them, the copies usually selling at prices lower than the garments copied. Petitioners call this practice of copying unethical and immoral, and give it the name of "style piracy." And although they admit that their "original crea-

[1] 114 F. (2d) 80. Because of inconsistency between the holding below and that of the First Circuit Court of Appeals in Wm. Filene's Sons Co. *v.* Fashion Originators' Guild of America, 90 F. (2d) 556, we granted certiorari. 311 U. S. —.

[2] 26 Stat. 209, 15 U. S. C. § 1 *et seq.*; 38 Stat. 730, 15 U. S. C. § 12 *et seq.*; 38 Stat. 717, 15 U. S. C. § 41 *et seq.*

tions" are neither copyrighted nor patented, and indeed assert that existing legislation affords them no protection against copyists, they nevertheless urge that sale of copied designs constitutes an unfair trade practice and a tortious invasion of their rights. Because of these alleged wrongs, petitioners, while continuing to compete with one another in many respects, combined among themselves to combat and, if possible, destroy all competition from the sale of garments which are copies of their "original creations." They admit that to destroy such competition they have in combination purposely boycotted and declined to sell their products to retailers who follow a policy of selling garments copied by other manufacturers from designs put out by Guild members. As a result of their efforts, approximately 12,000 retailers throughout the country have signed agreements to "cooperate" with the Guild's boycott program, but more than half of these signed the agreements only because constrained by threats that Guild members would not sell to retailers who failed to yield to their demands—threats that have been carried out by the Guild practice of placing on red cards the names of non-cooperators (to whom no sales are to be made), placing on white cards the names of cooperators (to whom sales are to be made), and then distributing both sets of cards to the manufacturers.

The one hundred and seventy-six manufacturers of women's garments who are members of the Guild occupy a commanding position in their line of business. In 1936, they sold in the United States more than 38% of all women's garments wholesaling at $6.75 and up, and more than 60% of those at $10.75 and above. The power of the combination is great; competition and the demand of the consuming public make it necessary for most retail dealers to stock some of the products of these manufacturers. ~~And the power of the combination is made even~~ And the power of the combination is made even greater by reason of the affiliation of some members of the National Federation of Textiles, Inc.—that being an organization composed of about one hundred textile manufacturers, converters, dyers, and printers of silk and rayon used in making women's garments. Those members of the Federation who are affiliated with the Guild have agreed to sell their products only to those garment manufacturers who have in turn agreed to sell only to cooperating retailers."

textiles. The Guild employs "shoppers" to visit the stores of both cooperating and non-cooperating retailers, "for the purpose of examining their stocks, to determine and report as to whether they contain . . . copies of registered designs . . . ." An elaborate system of trial and appellate tribunals exists, for the determination of whether a given garment is in fact a copy of a Guild member's design. In order to assure the success of its plan of registration and restraint, and to ascertain whether Guild regulations are being violated, the Guild audits its members books. And if violations of Guild requirements are discovered, as, for example, sales to red-carded retailers, the violators are subject to heavy fines.[3]

In addition to the elements of the agreement set out above, all of which relate more or less closely to competition by so-called style copyists, the Guild has undertaken to do many things apparently independent of and distinct from the fight against copying. Among them are the following: the combination prohibits its members from participating in retail advertising; regulates the discount they may allow; prohibits their selling at retail; cooperates with local guilds in regulating days upon which special sales shall be held; prohibits its members from selling women's garments to persons who conduct businesses in residences, residential quarters, hotels or apartment houses; and denies the benefits of membership to retailers who participate with dress manufacturers in promoting fashion shows unless the merchandise used is actually purchased and delivered.

If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition.[4] From its findings the Commission concluded that the petitioners, "pursuant to understandings, arrangements, agreements, combinations and conspiracies entered into jointly and severally" had prevented sales in interstate commerce, had "sub-

[3] In one instance a fine of $1500 was imposed, and the Guild notified its membership that a fine of $5000 would be assessed in case of future violation.

[4] Federal Trade Commission *v.* Beech-Nut Packing Co., 257 U. S. 441, 453-455. See 26 Stat. 209, 15 U. S. C. § 1 *et seq.*; 38 Stat. 730, 15 U. S. C. § 12 *et seq.*; 38 Stat. 717, 15 U. S. C. § 41 *et seq.* By 38 Stat. 734, 15 U. S. C. § 21, the Federal Trade Commission is expressly given authority to enforce the Clayton Act.

stantially lessened, hindered and suppressed" competition, and had tended "to create in themselves a monopoly." And paragraph 3 of the Clayton Act (15 U. S. C. § 14) declares "It shall be unlawful for any person engaged in commerce, ... to . . . make a sale or contract for sale of goods, . . . on the condition, agreement, or understanding that the . . purchaser thereof shall not use or deal in the goods, . . . of a competitor or competitors of the . . . seller, where the effect of such . . . sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monoply in any line of commerce." The relevance of this section of the Clayton Act to petitioners' scheme is shown by the fact that the scheme is bottomed upon a system of sale under which (1) textiles shall be sold to garment manufacturers only upon the condition and understanding that the buyers will not use or deal in textiles which are copied from the designs of textile manufacturing Guild members; (2) garment manufacturers shall sell to retailers only upon the condition and understanding that the retailers shall not use or deal in such copied designs. And the Federal Trade Commission concluded in the language of the Clayton Act that these understandings substantially lessened competition and tended to create a monopoly. We hold that the Commission, upon adequate and unchallenged findings, correctly concluded that this practice constituted an unfair method of competition.[5]

Not only does the plan in the respects above discussed thus conflict with the principles of the Clayton Act; the findings of the Commission bring petitioners' combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself. Section 1 of that Act makes illegal every contract, combination or conspiracy in restraint of trade or commerce among the several states; Section 2 makes illega every combination or conspiracy which monopolizes or attempts to monopolize any part of that trade or commerce. Under the Sherman Act "competition not combination, should be the law of trade." *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129. And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell

[5] Cf. Federal Trade Commission *v.* R. F. Keppel & Bro., 291 U. S. 304, 314; Standard Fashion Co. *v.* Magrane-Houston Co., 258 U. S. 346, 357.

and the sources from which retailers can buy (*Montague & Co.* v. *Lowry*, 193 U. S. 38, 45; *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20, 48-49); subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott (*Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 609-611); takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs (*United States* v. *American Linseed Oil Co.*, 262 U. S. 371, 389); and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs (*United States* v. *American Linseed Oil Co., supra*, at 389). In addition to all this, the combination is in reality an extra-governmental agency which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the statute." *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 242.

Nor is it determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly. For "it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition." *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 237. It was, in fact, one of the hopes of those who sponsored the Federal Trade Commission Act that its effect might be prophylactic and that through it attempts to bring about complete monopolization of an industry might be stopped in their incipiency.[6]

Petitioners, however, argue that the combination cannot be contrary to the policy of the Sherman and Clayton Acts, since the Federal Trade Commission did not find that the combination fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality. But action falling into these three categories does not exhaust the types of conduct banned by the Sherman and Clayton Acts. And as previously pointed out, it was the object of the Federal Trade Commission Act to reach not

[6] Federal Trade Commission *v.* Raladam Co., 283 U. S. 643, 647. And see remarks of Senator Cummins, Chairman of the Committee which reported the bill, 51 Cong. Rec. 11455, quoted by Brandeis, J., in Federal Trade Commission *v.* Gratz, 253 U. S. 421, 435.

merely in their fruition but also in their incipiency combinations which could lead to these and other trade restraints and practices deemed undesirable. In this case, the Commission found that the combination exercised sufficient control and power in the women's garments and textile businesses "to exclude from the industry those manufacturers and distributors who do not conform to the rules and regulations of said respondents, and thus tend to create in themselves a monopoly in the said industries." While a conspiracy to fix prices is illegal, an intent to increase prices is not an ever-present essential of conduct amounting to a violation of the policy of the Sherman and Clayton Acts; a monopoly contrary to their policies can exist even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold. For as this Court has said, "Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital."[7]

But petitioners further argue that their boycott and restraint of interstate trade is not within the ban of the policies of the Sherman and Clayton Acts because "the practices of FOGA were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four." The Commission declined to hear much of the evidence that petitioners desired to offer on this subject. As we have pointed out, however, the aim of petitioners' combination was the intentional destruction of one type of manufacture and sale which competed with Guild members. The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts. For this reason, the principles announced in *Appalachian Coals, Inc.* v. *United States*, 288 U. S.

[7] United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, 323.